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IN THE

Supreme Court of the United States

October Term, 1957.

SOUTHERN RAILWAY COMPANY, Et Al.,
Appellants,

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, Et Al.,
Appellees.

No. 558.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

MOTION OF APPELLEES, HARLAN COUNTY COAL OPERATORS ASSOCIATION, ATLANTIC COAST LINE RAILROAD COMPANY, INTERSTATE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, AND NORFOLK AND WESTERN RAILWAY COMPANY, TO AFFIRM

AND

BRIEF IN SUPPORT OF THE MOTION.

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AND

BRIEF IN SUPPORT OF THE MOTION.

I.

THE MOTION.

Harlan County Coal Operators Association, Atlantic Coast Line Railroad Company, Interstate Railroad Company, Louisville and Nashville Railroad Company, and Norfolk and Western Railway Company, appellees

> of through routes we need not determine. We are satisfied, however, that the evidence before the Commission did not compel it to make such a finding and that its conclusion that the through routes claimed were not in existence is supported by substantial evidence.

Here, as there, the Commission's judgment on such a technical question is plainly entitled to great weight and should not be disturbed unless found to be clearly erroneous. Cf. *Board of Trade* v. *United States*, 314 U. S. 534, 546–548.

With respect to appellants' contention, the Commission correctly defined the term through route[3] and found (299 I. C. C. at 337):

> It is contended by the defendants that the routes including the Clinchfield or the Georgia are commercially closed, and that through rates on fine coal cannot be prescribed without contemporaneously prescribing through routes. A through route may be defined as an arrangement, express or implied, between connecting carriers by which they hold themselves out as offering through transportation service from a point on the line of one to a destination on the line of another. A joint rate is not essential to the existence of a through route, but the establishment of joint rates presupposes through routes. As stated, joint rates are applicable on fine coal transported from the origin groups under consideration to destinations in the Carolinas, over routes which include the Clinch-

[3] See the definitions of through route in *Denver & Rio Grande W. R. Co.* v. *United States*, 351 U. S. 321, 327; *Thompson* v. *United States*, 343 U. S. 549, 556–557; *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 139, n. 2.

field or the Georgia as intermediate carriers and the defendants as delivering carriers. It follows that the routes in question are through routes within the meaning of section 15 of the act. Nothing in that section imposes a restriction on our power to prescribe just and reasonable through rates over such routes.

Ample support for the Commission's findings is provided by the following undisputed facts:

(1) The routes embracing the Clinchfield or the Georgia Railroad have been recognized and utilized as through routes for the transportation of all sizes of coal, including fine coal, at joint commodity rates for many years prior to April 8, 1954.

(2) These long-standing through routes and joint rates were not cancelled by tariff publication, and both before and after April 8, 1954, joint rates on all sizes of coal, including fine coal, have been and still are in effect over them.

(3) Although the availability of lower rates on fine coal over the alternate routes since April 8, 1954, has rendered the routes via the Clinchfield or the Georgia Railroad commercially undesirable for the movement of fine coal, other sizes of coal have continued to move over them at joint commodity rates and a few shipments of fine coal have done so.

As the court below (J. St. 6a) and the Commission (299 I. C. C. at 337) pointed out, while a joint rate is not essential to the existence of a through route, the presence of joint rates necessarily presupposes through routes. The obvious truth of this proposition was recognized by the Court in *United States* v. *Great Northern Ry. Co.*, 343 U. S.

562, 574, where it said that "joint rates published by two or more carriers are by definition always applicable to a through route over the lines of those carriers * * *." The existence of joint commodity rates on all sizes of coal, including fine coal, applicable over the Clinchfield and the Georgia Railroad routes constitutes an express holding out by tariff by the participating carriers that the routes exist and are available for the through transportation of such coal at the published rates.

There remains appellants' claim that the complainants before the Commission admitted that the routes in question have been "eliminated," "closed," and "discontinued" and that the Commission found them to be "closed" (J. St. 14–15). Appellants appear to be suggesting that both the complainants and the Commission agreed with appellants' position that the routes were no longer in existence as through routes. In this, appellants are in error.

We agree that the Commission found, among other things, that, as a consequence of the rate reduction, only a few shipments of fine coal have been moving over the higher rated routes, and the routes have been effectively closed to fine coal traffic. But the Commission also found explicitly that these same routes were in existence, hence were never eliminated in any legal sense. The lower court was clearly correct in saying (J. St. 7a):

> That the Commission did so find is clear. Its references in its decision to these routes as "closed" was in a commercial sense only, for the Commission was emphasizing the diver-

sion of traffic which naturally occurred as a result of the establishment of lower rates on competing routes.

So far as the complaint filed with the Commission is concerned, we submit that a fair reading of it in its entirety leaves no doubt that complainants were speaking of the commercial closing of routes due entirely to the fact that the availability of lower rates over other routes made it economically impractical for shippers to utilize the higher rated routes for the shipment of fine coal. The words "reinstatement" and "eliminated" must be, and were, interpreted in this context. The failure of appellants to join in the maintenance of reasonable through rates over these routes as required by Section 1 (4) of the Act was specifically stated as a ground for relief.

In short, the uncontroverted evidence of record shows that the routes via the Clinchfield or the Georgia Railroad are established through routes over which joint commodity rates apply on coal, including fine coal, and over which the participating carriers, including appellants, must transport coal so routed at the applicable rates. We submit that the Commission's finding that the routes are existing through routes is fully justified, if not compelled, by the facts, and was properly upheld by the court below. This being so, the power of the Commission to prescribe just and reasonable rates is in no way limited by Section 15 (4) of the Act. *United States* v. *Great Northern Ry. Co.*, 343 U. S. 562; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658; *Great Northern Ry. Co.* v. *United States*, 81 F. Supp. 921 (D. Del.), affirmed,

336 U. S. 933; see *Thompson* v. *United States*, 343 U. S. 549, 556.

2. Appellants next contend that the Commission departed from statutory standards and acted arbitrarily in requiring the assailed rates on fine coal via the Clinchfield and Georgia Railroad routes to be reduced to the level of the fine coal rates voluntarily established over the competing routes (J. St. 7–9, 25–32).

After noting that the law requires that traffic moving over established through routes shall be subject to just and reasonable rates (299 I. C. C. at 337),[4] the Commission made a series of subsidiary findings and ultimately concluded (*id.* at 340):

> We find that the assailed rates on fine coal, in carloads, from and to the points under consideration herein, over the described through routes embracing the Clinchfield or the Georgia Railroad as intermediate carriers, are and for the future will be unjust and unreasonable to the extent that they exceed or may exceed the joint carload rates on fine coal contemporaneously applicable over other through routes, from and to the same points, in which the defendants participate as delivering carriers.

That the supporting findings, detailed at pages 337–340 of the report, are amply supported by the evi-

[4] In pertinent part, Section 1 (4) of the Act provides:

"It shall be the duty of every common carrier subject to this part * * * to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto * * *."

dence cannot be seriously disputed. (See the statement, of facts, *supra,* pp. 4–7.) In addition to findings of background facts, the Commission made the following key findings:

(1) The routes from the origin mines over which the reduced fine coal rates apply are longer than the alternate routes over the Clinchfield to which the assailed joint rates apply, and routes through Atlanta to South Carolina destinations which take the reduced rates are longer than the higher rated routes which embrace the Georgia Railroad as an intermediate carrier between Atlanta and Augusta.

(2) Were the reduced rates made applicable to all routes, car-mile revenues would be greater over the Clinchfield and the Georgia Railroad routes due to the shorter distances.

(3) Prescribed group relationships which have existed for many years have been disturbed, insofar as the higher rated routes are concerned, by the refusal of appellants to join in the reduced fine coal rates over those routes. (See the statment of facts, *supra,* pp. 6–7.)

(4) The assailed rates are too high to move fine coal traffic.

(5) In ascertaining the reasonableness of the assailed rates, the reduced joint rates may be validly used for purposes of comparison. This is so even though the reduced rates were established for competitive purposes, since the competitive influence exerts equal force on all fine coal shipped from the same origins and marketed at the same destinations, however it may move.

We submit that the lower court was correct in holding that "the action of the Commission was abundantly justified by the evidence before it and its findings based thereon" (J. St. 8a).

Appellants appear to argue that once the Commission has prescribed a maximum level of rates on coal of all sizes applicable over all routes here involved, it may not thereafter prescribe a lower rate on fine coal over certain of those routes even though the carriers themselves, in recognition of a changed competitive situation, have established the same lower rate over the remainder (J. St. 26–29). But the rate making process is not so inflexible as appellants would have it. Cf. *Board of Trade* v. *United States*, 314 U. S. 534, 546.

In initiating the rate reduction, the carriers must have considered that the lower rate was just and reasonable, even necessary, under the circumstances, and that the prior prescription of a maximum reasonable rate interposed no barrier to the reduction. As participants in the reduction, appellants were obviously of the same mind.

The propriety of using lower rates voluntarily established as evidence of reasonableness has long been recognized by this Court and by the Commission. *E. g., Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 666; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 565; *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 145; *Auburn Mills* v. *Chicago & A. R. Co.*, 222 I. C. C. 495, 497; *Sheridan Chamber of Commerce* v. *C., B. & Q. R. R. Co.*, 26 I. C. C. 638, 647 and 28 I. C. C. 250, 257. The simi-

larity in essential features between the present case and the *Virginian Ry. Co.* case, *supra,* is striking; and in our view, the Court's reasoning and conclusions at pages 665–666 are dispositive here.

Appellants' other contentions are equally without merit. The Commission's reference to Section 15a (2) was not error. The "effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed" is clear. To the extent that equalization of the fine coal rates would again encourage coal to move over all routes, the same carriers would participate in the traffic as did so over the lower rated routes. In addition, the excluded carriers would again have the opportunity to participate in traffic which they enjoyed prior to the rate reduction of April 8, 1954.[5] And, as the Commission recognized, car-mile revenues would actually be higher for all of the participating carriers over the Clinchfield and Georgia Railroad routes due to their shorter length.

Moreover, even should appellants be correct in their contention that Section 15a (2) is not applicable, we submit that this would not be ground for reversal. Quite apart from that section, the conclusion here is fully justified and amply supported by adequate findings based upon substantial evidence.

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[5] Admittedly, the appellants' hauls over the Clinchfield and Georgia Railroad routes would be shorter than over the other routes. But there is no principle of law which requires that a carrier must receive its longest possible haul, especially when it does not originate the traffic, at the cost of denying to other carriers any haul at all.

Appellants suggest that there are a greater number of exchanges required over certain of the higher rated routes than over routes taking the reduced rates. But they participate in the reduced rates from the Big Sandy mines over routes of the Chesapeake & Ohio to Elkhorn City, Kentucky, thence the Clinchfield through St. Paul and Miller Yard, Virginia, to Marion or Spartansburg, and the Southern beyond. Also, interchanges are the same in number from mines on the Norfolk and Western over the route taking the reduced rates and the route denied them.

CONCLUSION

We submit that the decision below is clearly correct and that this case presents no substantial question. The judgment of the district court should be affirmed.

Respectfully submitted.

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The *Thompson* case arose from an order wherein the Commission required the establishment of a joint rate over a through route via the Burlington and Missouri Pacific railroads in the transportation of grain from Lenora, Kansas, and other points to Omaha, Nebraska. This court held that there was no *evidence that any shipments had ever been made or through service ever offered* from Lenora to Omaha via the Burlington and Missouri Pacific railroads,[1] and that only local rates applied over each road to the junction with the other.[2] The Commission's order which had found that a through route did exist was consequently set aside. Obviously, such a state of facts is in no way comparable to the facts of this case. Here the record shows beyond question that joint rates and through routes have long been available and have moved a substantial volume of coal.

Nor can anything which this Court held in the *Denver and Rio Grande* case support appellants' contention. There, a finding of the Commission that through routes did not exist was upheld. After holding that the Commission's finding would not be disturbed if supported by substantial evidence, this Court proceeded to relate the pertinent facts upon which the Commission made its finding. Significant is that joint rates over the assailed routes had been cancelled between 1906 and 1913, leaving only higher combination rates to apply on the movement of various commodi-

[1] 343 U. S. at p. 551.
[2] 343 U. S. at p. 558.

ties,[3] which situation had not been changed at the time the Rio Grande filed its complaint with the Commission in 1949.[4] In other words, there, unlike the situation here, joint rates were not in effect, and had not been in effect for many years.

It is of importance to note also that the Commission in its report and order in that case was evenly divided, 5 and 5, with one member not participating, on the question of the existence of through routes.[5]

Appellants undertake (Ju. St. pp. 21-23) to draw an analogy between class rates and class routes, and reductions thereunder in the form of commodity rates, on the one hand, and the facts existing in this case, on the other. They say, if the Commission's order is upheld, then the result would be that, in any instance where certain carriers seek to reduce rates below the class-rate level by publication of specific commodity rates, all carriers participating in routes over which class rates apply would be entitled to a reduction of their rates over such routes.

There is no real analogy in the two situations. Here we are dealing with reductions in commodity rates, over a limited number of routes. Here appellants have tried to prevent the reductions from being made over the most direct routes, via which a substantial volume of traffic has always moved and which routes have been an integral part of the coal rate structure in the involved territory.

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[3] 351 U. S. at p. 328.

[4] 351 U. S. at p. 328.

[5] *Denver & R. G. W. R. Co.* v. *Union P. R. Co.*, 287 I. C. C. 611 (1953).

The validity of any such comparison, moreover, is essentially a question for consideration by the Commission, not the courts. Howbeit, there is nothing in the Interstate Commerce Act which would prohibit other carriers, which have continuously moved the hypothetical traffic mentioned at class rates over the through class-rate routes, from obtaining a rate reduction over such through routes, so long as such other carriers can prove the class rates unreasonable to the extent that they exceed the new reduced commodity rates. Certainly publication of such commodity rates would not automatically close all existing through routes. There is no basis in logic or law for saying unequivocally that a class-rate route, or other published tariff route, is not a through route, particularly if, as here, that route has been continuously used over a long period of time in the transportation of the commodity involved.

Appellants further contend (Ju. St. p. 15) that the appellee carriers' complaint before the Commission, the testimony of the witnesses, and the order of the Commission itself, indicate that appellants' limited concurrence in the rate reduction "closed" the Clinchfield and the Georgia Railroad routes.

Appellee railroads' complaint before the Commission did contain the prayer set forth in appellants' Jurisdictional Statement (p. 15). This complaint, however, also contained the following allegation:

> "That by reason of the facts stated in the foregoing paragraphs the defendants herein have failed in their duty to maintain reasonable through

rates as required under Section 1(4) of the Interstate Commerce Act." (p. 4)

And it is upon that allegation that appellees' case was predicated. The theory on which the case was tried before the Commission is conclusively shown in appellants' Exceptions to the Recommended Report and Order of the Commission's Hearing Examiner where at page 3 appellants themselves said:

". . . In agreeing to publish the 35-cent rate reduction, Southern Railway restricted application of the reduced rates to routes via Knoxville and Appalachia, thus effectively and commercially closing the other routes via the Clinchfield Railroad and the Georgia Railroad from the same origin. *The complaints* [sic] *seek a parity of rates, not the reopening or reestablishment of the closed routes.*" (Emphasis added)

Appellants refer (Ju. St. p. 15) to several statements of record by appellees' witness Roby about the involved routes being "closed", and to other expressions of similar import, but a reading of the testimony of the witness shows clearly that he was referring to such routes as being "commercially closed", as distinguished from non-existence of through routes. This may be seen in the following:[6]

". . . However, these rates that were reduced April 8, 1954, which are confined to fine coal, do not apply over routes other than those routes which afford the Southern Railway its longer haul from the first junction where it interchanges traffic with

[6]Tr. 104.

the originating railroad. Where rates are lower over one route than over another, the higher rated route is commercially closed, as from a praccical [sic] standpoint it is never used except by mistake."

The testimony of appellants' principal witness (Adcock) further illustrates the baselessness of appellants' position, the following being from his cross-examination:[7]

"Q. You say those routes were cancelled. Do you mean the routes were cancelled, or do you mean that the fine coal rates were made non-applicable over those routes?

A. What you just said, I think, Mr. Hastings, is probably the more accurate way to express the idea.

Q. I don't want to labor this point, but, on page 3, in the second literary paragraph, you use the word routes 'closed.' More accurately, that would be that the fine coal rates, reduced fine coal rates, were made non-applicable over those routes?

A. That is true. I [sic] was with the thought that it was commercially closed because of the difference of the two rates."

This Court recognized the validity of this distinction in *Thompson* v. *U. S.*, *supra*, 343 U. S. 549, where, in a footnote at page 560, it stated:

"[15]*Virginian R. Co.* v. *United States*, 272 U. S. 658 (1926), is inapposite since through routes were there found to be in existence but *commercially*

[7]Tr. 281.

closed solely because of unreasonable and discriminatory rates charged by the Virginian over its portion of the route. . . .'" (Emphasis added)

Similarly the Commission's statement that appellants' action "closed to traffic the higher rated routes as effectively as if schedules had been established with that sole objective,'"[8] relates solely to a commercial closing of the routes.[9]

What appellants undertook to do was to take advantage of a critical situation where general rate reductions had to be made, in which shippers and railroads alike had vital interests and where these appellees could not, without great harm to themselves, seek suspension of the schedule containing the route restrictions since it published also the reduced rates. By such tactics appellants sought to accomplish effective route cancellation without subjecting themselves to the burden of proof which rests upon them under Section 15(3) of the Interstate Commerce Act,[1] and to escape the responsibility of proving that the cancellation of through routes will be consistent with the public interest.[2]

Appellants' position in this case is simply that they have the exclusive right, superior to that of any other

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[8] 299 I. C. C. at p. 339.

[9] As the Court below expressly held, 157 F. Supp. at p. 61:

"... Its references in its decision to these routes as 'closed' was in a commercial sense only, for the Commission was emphasizing the diversion of traffic which naturally occurred as a result of the establishment of lower rates on competing routes."

[1] 54 Stat. 911, 49 U. S. C. 15(3).

[2] Please see decision of the Court below, 57 F. Supp. at p. 61, and Report of the Commission, 299 I. C. C. at pp. 339, 340.

railroad, including those which originate the traffic, to determine the routes over which the fine coal shipments here involved shall move. They have exercised this self-determined prerogative in connection with these reduced fine-coal rates to the point where they seek to deprive the Louisville and Nashville Railroad from feeding traffic to its leased lines, the Clinchfield and the Georgia Railroad; they have sought to deprive the Interstate Railroad of its long haul,[3] even though that carrier originates the traffic; and they have sought to determine for the Norfolk and Western, also an originating line, the junction at which appellants will accept fine coal movements.

Appellants fail to recognize that the cancellation of established through routes is not a subject to be treated adjunctively with the publication of a general rate revision. Such cancellation is a matter for consideration and determination by the Commission as a separate and distinct subject. In *A. T. & S. F. Ry.* v. *United States*, 279 U. S. 768, 776-777 (1929), this Court held:

> "The broad power to pass on the reasonableness of rates conferred upon the Commission in 1887 has not been in terms limited by any amendatory act. On the other hand, there has been much legislation designed to make the power more effective. The special power to establish through routes and joint rates was not conferred until 1906. Act of June 29, 1906, c. 3591, §4, 34 Stat. 584. There is not in that Act as amended, see *United States* v.

[3] Ex. 30 (Tr. 237, 265).

American Express Co., 265 U. S. 425, 430, note 2, or in any decision of this Court construing it; or in any of the decisions of the Commission applying it, to which attention has been called, the slightest basis for the suggestion that in conferring the restricted power to establish through routes, Congress intended to limit the theretofore unrestricted power of the Commission to pass upon the reasonableness of rates. . . ."

The final sentence[28] in Section 15(3) of the Interstate Commerce Act makes it abundantly clear that the cancellation of a through route is to be made by schedules specifically published for that purpose. The Court below recognized this principle, in holding:

> "The Act provides a procedure by which a carrier may cancel a through route which is uneconomic or burdensome, but it carries the burden of proof in the hearings that may be held upon its application. . . ." (153 F. Supp. at p. 60)

When, therefore, a railroad seeks to accomplish, as a part of a readjustment of a general rate structure, the commercial destruction of established through routes via which joint rates have applied for many years, in such circumstances as are present here, clearly it has not in law or in fact cancelled such routes.

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[28] Reading: ". . . If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

Question 2 Presents No Substantial Question.

Question 2 is whether the Commission departed from statutory standards and failed to make appropriate preliminary findings in determining that the rates on fine coal via the Clinchfield and the Georgia Railroad routes were unreasonable to the extent that such rates exceeded those applicable over appellants' long-haul routes.

The scope of judicial review of any such question is very limited. Accordingly, this Court said in *Virginian Ry.* v. *United States, supra,* 272 U. S. 658:

> ". . . The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.' *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541. . . ." (272 U. S. 658, 665-666)

Please see also: *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 536 (1946); *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 488 (1951). The Commission's order here under attack must be examined in light of those governing principles.

Appellants contend (Ju. St., p. 26) that the Commission could not properly prescribe reductions in rates on fine coal below the level it prescribed in 1948 for all sizes

of cost. Such an argument ignores the essential nature of the Commission's rate-making function. This Court in *Board of Trade* v. *United States*, 314 U. S. 534, 546 (1942), held:

> "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems."

The Commission in many cases, due to changing economic and competitive conditions, has prescribed rates to replace those it had previously prescribed. Notable among these decisions are *Coke Between Points in Central and Illinois Territories*, 194 I. C. C. 640 (1933), and *Coke from Alabama and Tennessee to Central Territory*, 208 I. C. C. 281 (1935) and 215 I. C. C 384 (1936), in which the Commission prescribed three successively lower bases of rates within a period of three years on coke from producing points in the South to the North. That action was approved by this Court in *B. & O. R. Co.* v. *U. S.*, 304 U. S. 58 (1938). In *Class Rate Investigation, 1939*, 262 I. C. C. 447 (1945), and 264 I. C. C. 41 (1945), the Commission, due to changes in economic and competitive conditions, equalized all class-rate structures east of the Rocky Mountains, although it had earlier prescribed comprehensive but different levels of class rates in the East, in the South and in several rate-territories west of

the Mississippi River and east of the Rockies. That action also received the approval of this Court—in *New York* v. *United States,* 331 U. S. 284 (1947). Please see also *Commonwealth of Kentucky* v. *Illinois Central R. Co.,* 259 I. C. C. 259 (1944), and *Coal Operators Asso.* v. *Baltimore and O. R. Co.,* 161 I. C. C. 3 (1930).

The involved rates are an integral and vital part of a general structure of rates on coal from the producing fields to the Carolina territory. Some of the very routes involved have played an important part in the established rate relationships between the various origin groups.[4] Therefore, for the same level of rates not to apply over such routes as applies over more circuitous routes results in the anomalous situation of the rate-making routes, or the routes responsible for the measure of the rate differentials, not being available for the movement of the traffic. In other words, but for the distances over the Clinchfield routes here involved, appellants would probably be required to maintain higher rates over their long-haul routes.

Indicative of the destruction of the rate relationships caused by appellants' action is appellants' participation in the fine coal rate reduction from the Chesapeake & Ohio Railway Big Sandy group of mines

[4] *Bituminous Coal Rates to the Southeast, supra,* 37 I. C. C. 652 (1915), *Coal from Louisville and N. R. Points,* 172 I. C. C. 704 (1931), and *Corporation Commission of N. C.* v. *Aberdeen and R. R. Co.,* 200 I. C. C. 571 (1934), show that the route of the Clinchfield has played a most important part in the construction of the rate relationships from the various origin groups, and that the relationships between a number of those groups would doubtless be different, and less favorable from the standpoint of appellants' long-haul routes, but for the Clinchfield route.

in West Virginia over the route in which the Clinchfield handles traffic from Elkhorn City, Ky., to Marion, N. C., or Spartanburg, S. C.[5] Prior to April 8, 1954, the rate on fine coal, as on other coal, was the same from the Big Sandy group over the Clinchfield route as the rate from the Louisville and Nashville Harlan group of mines via the Clinchfield route, notwithstanding that the distance from the Big Sandy group averages about 11 miles greater than from the Harlan group via the Clinchfield route.[6] The refusal of the Southern to concur in the rate reduction from the Harlan group over the Clinchfield route resulted in a 35-cent lower rate from the Big Sandy group than from the Harlan group via the Clinchfield route. The Commission cited this situation.[7] It is but one of many considerations which clearly showed that the rates over the routes in issue were unreasonable to the extent they exceeded the rates over appellants' long-haul routes and that the Commission's finding to that effect was well supported.

The Commission's finding was further supported by the fact that the shortest routes from all origins to destinations involved are via the Clinchfield and that the routes via the Georgia Railroad in all instances are shorter than the Southern Railway's long-haul routes through Atlanta. Therefore, as the Commission found,[8] in all cases the car-mile and ton-mile earnings from the same measure of rates would be greater over such routes than over appellants' long-haul routes.

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[5]Tr. 113, 114, Ex. 14 (Tr. 114, 215).

[6]*Ibid.*

[7]299 I. C. C. at p. 399.

[8]299 I. C. C. at p. 338.

Appellants seek (Ju. St. p. 26) to create the impression that they made the reductions in the fine coal rates, when the fact is that they could not alone have reduced a single rate involved in this case. Any reductions in such rates from the involved origins, of necessity, rested primarily with the originating carriers; appellants could only concur or not concur in the reductions proposed. Furthermore, the reductions were made from all group mines which ship fine coal to the Carolina territory. No single carrier or group of carriers controlled this reduction.

Proceeding from the erroneous premise that appellants made the reduction in the fine coal rates, they contend (Ju. St., pp. 26, 27) that the Commission erred in not recognizing the realm of appellants' managerial discretion. There is, to be sure, as appellants say (Ju. St., p. 27), a zone of reasonableness within which carriers ordinarily, in their managerial discretion, are entitled to reduce rates below the level prescribed by the Commission. However, the managerial discretion of all railroads participating in this traffic manifested itself in favor of the 35-cent reduction in the rate on fine coal. Appellants here seek to superimpose their managerial discretion upon that of all other carriers involved in this case by attempting to dictate over which routes this rate reduction should apply, even though appellants do not originate the traffic. The Commission is not powerless to deal with such a situation under section 1(4) of the Interstate Commerce Act as the argument implies. Nothing in the *New York*

Central case,[9] cited by appellants, holds that the Commission, upon complaint of carrierr and shippers, cannot order reductions in rates over through routes so long as the Commission makes adequate findings supported by substantial evidence that such rates are unjust or unreasonable in violation of Section 1(4) of the Interstate Commerce Act.

Appellants' contention (Ju. St. p. 28) that there is a "complete absence of any finding" by the Commission that the rates previously prescribed could be departed from in ordering reduced rates on fine coal over the assailed routes, is without any basis whatever. The contention ignores the Commission's finding (299 I. C. C. at p. 339) that "the evidence leaves no doubt that the assailed rates are too high to move fine coal from and to the points under consideration."

Appellants attack the Commission for having given consideration to the effect of reduced rates on the movement of traffic over the involved routes (Ju. St. pp. 21, 30), but Section 15a(2) expressly provides:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; . . ."

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[9] *New York Cent. R. Co.* v. *United States*, 99 F. Supp. 394 (D.C., D. Mass., 1951), affd. 342 U. S. 890. In that case the District Court set aside a Commission order cancelling schedules of a rate reduction on export grain which all rail carriers favored on the ground that:

> "We conclude, therefore, that the Commission's decision lacks the support of adequate findings and substantial evidence, and must be set aside . . . (p. 405).

Appellants say (Ju. St. p. 30) that that section "has reference to all traffic from a point of origin to a destination, irrespective of the routes taken." The point appellants seek to make seems to be that as long as traffic moves freely over any route between two points, the Commission is not to consider or be concerned with the effect of rates on the movement of traffic over other routes between the same points. That is a most curious interpretation of the statute and does severe violence to its plain language. It reads completely out of the statute the very significant words, "by the carrier or carriers for which the rates are prescribed."

The higher or unreduced rates over the Clinchfield and Georgia Railroad routes had practically prevented the movement of fine coal between the involved origins and destinations over those routes. To say that the Commission may not consider, particularly in the light of such a statute as Section 15a(2), the effect of the measure of the rates on the movement of traffic in determining what are just and reasonable rates over such routes is to say that the Commission must deal with rates under Section 1(4) on an utterly impractical and unrealistic basis. Such an argument shows clearly what a thoroughly unsubstantial question appellants present.

Plainly what appellants seek in their arguments presented under Question 2 is to have the Court substitute its judgment for that of the Commission in the technical area of reasonableness of rates, which this Court has repeatedly declared it will not do.

CONCLUSION.

The questions presented in appellants' Jurisdictional Statement are entirely devoid of substance. Therefore, appellees' motion should be granted and the decree of the court below affirmed.

Respectfully submitted,

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PROOF OF SERVICE.

I, James W. Hoeland, one of the attorneys for these appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Motion to Affirm and Brief in support thereof on appellants by mailing copies thereof, air-mail postage prepaid, to their attorneys of record, as follows:

Mr. Henry L. Walker,
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Mr. Henry J. Karison,
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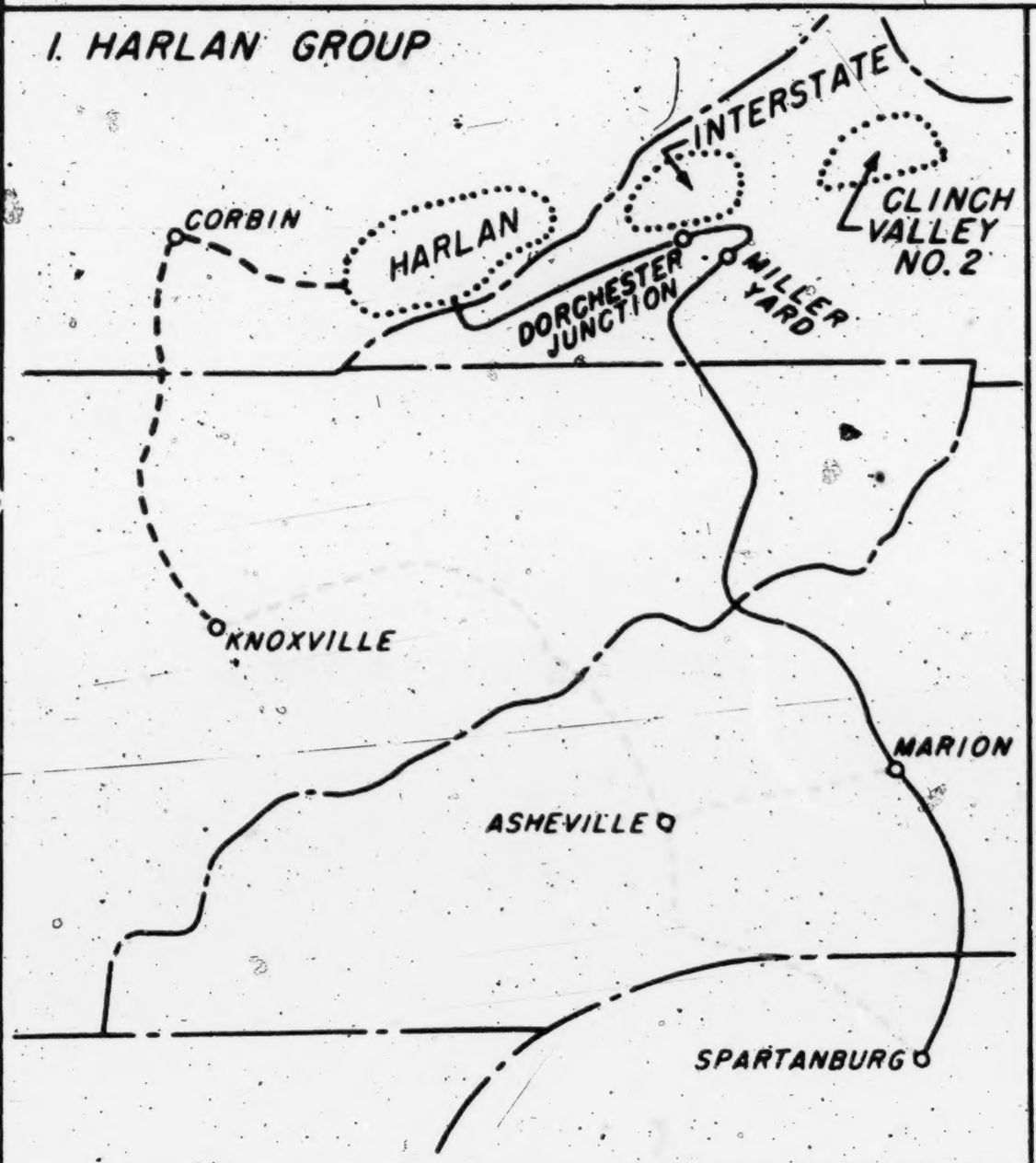
Mr. R. Granville Curry
631 Southern Building,
Washington, D. C.

This 15th day of November, 1957.

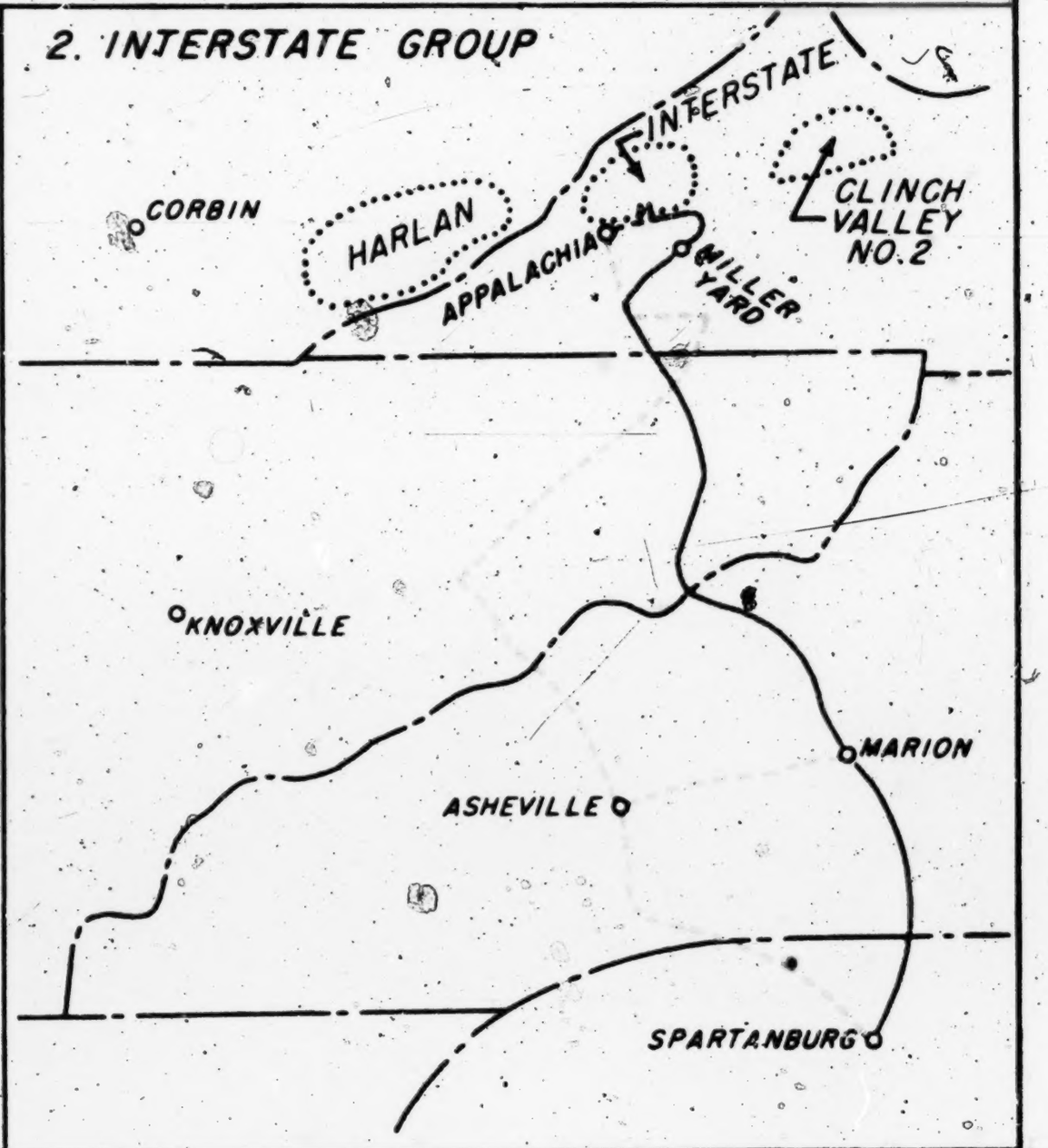
JAMES W. HOELAND.

SCHEMATIC DIAGRAMS OF ROUTES FROM THE SEVERAL MINE GROUPS

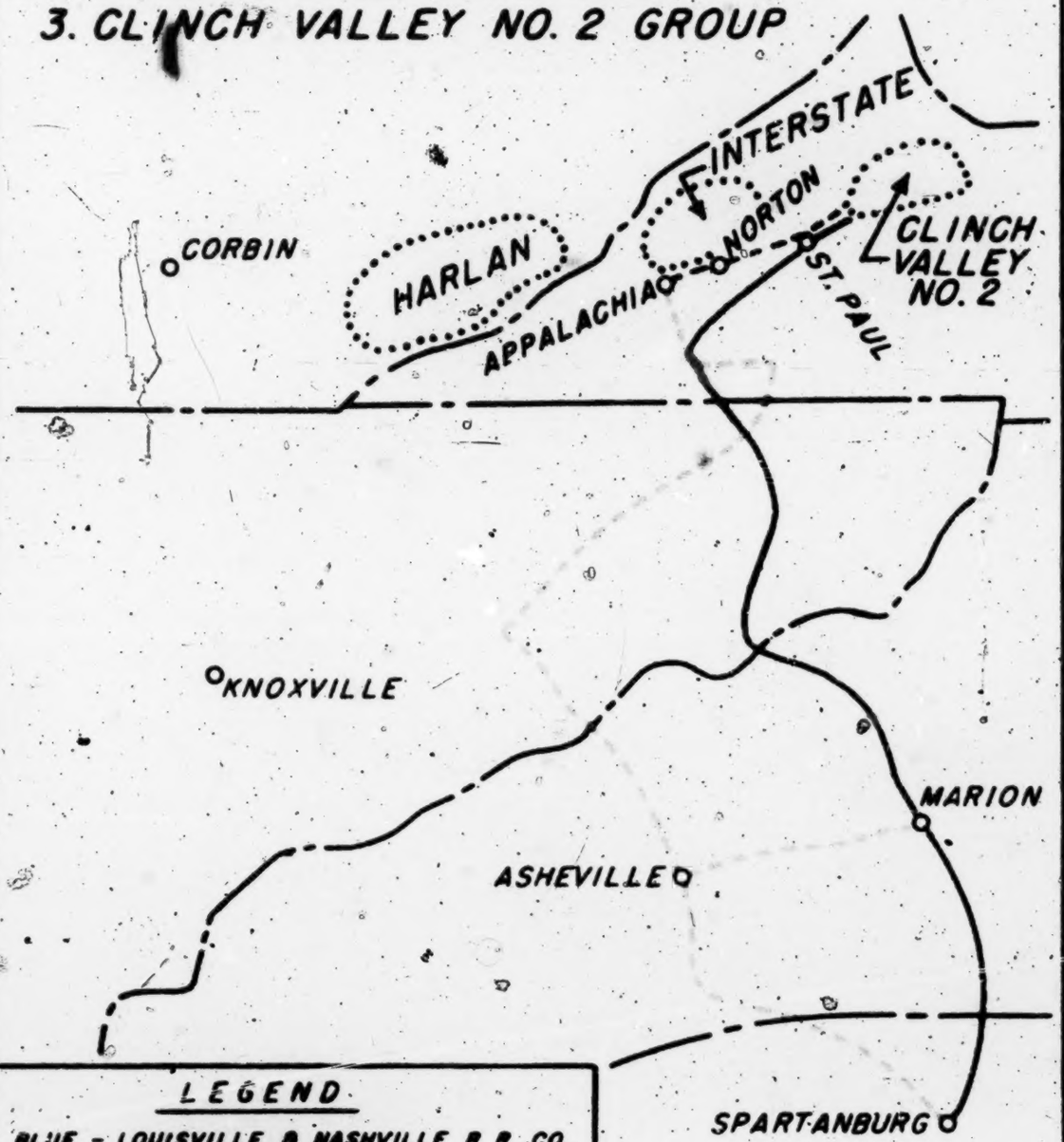
1. HARLAN GROUP



2. INTERSTATE GROUP



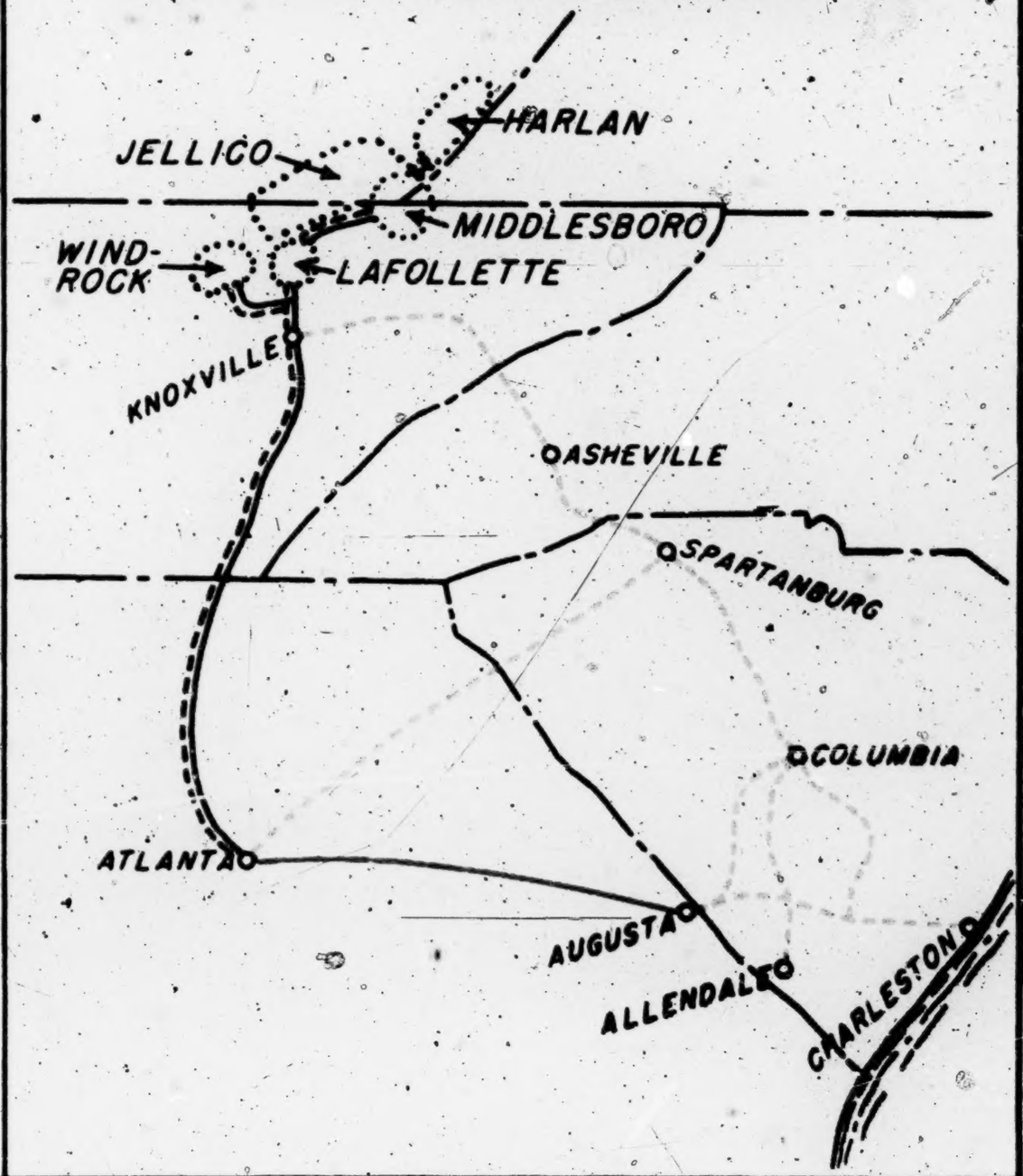
3. CLINCH VALLEY NO. 2 GROUP



LEGEND

BLUE - LOUISVILLE & NASHVILLE R.R. CO.
RED - INTERSTATE R.R. CO.
BROWN - NORFOLK & WESTERN RY. CO.
GREEN - CLINCHFIELD R.R. CO.
ORANGE - GEORGIA R.R.
YELLOW - SOUTHERN RY.

4. HARLAN, JELLICO-MIDDLESBORO, LAFOLLETTE AND WINDROCK GROUPS



Reproduction of Statutory Provisions Pertinent to This Case

TITLE 49 U. S. C.

§ 1. Regulation in general; car service; alteration of line—Carriers subject to regulation

Duty to furnish transportation and establish through routes; division of joint rates

(4) It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

§ 15a. Fair return for carriers

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

LEGEND

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